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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 10/081,788 | 02/22/2002 | Robert Petermann | 88265-6778 | 2714 |
| 29157 | 7590 | 04/10/2006 | EXAMINER | |
| BELL, BOYD & LLOYD LLC P. O. BOX 1135 CHICAGO, IL 60690-1135 | | | HENDRICKS, KEITH D | |
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| | | | 1761 | |
| DATE MAILED: 04/10/2006 | | | | |

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/081,788

Applicant(s)

PETERMANN ET AL.

Examiner

Keith Hendricks

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 06 January 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-9 and 12-20 is/are pending in the application.
- 4a) Of the above claim(s) 12-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
 - ☐ Certified copies of the priority documents have been received in Application No. _____.
 - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on January 06, 2006, has been entered.

Response to Arguments

Applicant's arguments with respect to claims 1-9 have been considered but are moot in view of the new ground(s) of rejection.

Examiner's Note: Applicant has amended the claims to "a composite soft, unripened *curd* fermented milk product" (emphasis added). Applicant's definition of a curd requires a milk product wherein the milk protein is coagulated for example by the addition of rennet (see specification, bottom of page 2), and thus the claims are limited as such. This differentiates the claims from those of a yogurt product, which does not use rennet to coagulate the milk proteins.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

i) Claims 1-2 and 5-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Warendorf (EP 0 853 888).

Warendorf discloses a dessert product comprising a milk-based component and an embedded fruit-based component which provides flavor and color, such as fruit puree, fruit granules or fruit juice. The milk-based component is made from a fermented milk, such as

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cheese, curd or yogurt, and may be in the form of an aerated mousse, pudding, etc. (pg. 2, ln. 53-56). The product has been whipped to an overrun "in the area of 100%." Either or both of the phases (milk and/or fruit) may contain thickeners such as polysaccharides. See also the fruit phase as element 24 in Figure 4, which demonstrates the production of fruit phase stripes throughout the milk-based component, as well as the description at pages 3 (the third embodiment, lines 40-42), and page 4 (the third embodiment, lines 16-34).

ii) Claims 1-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Bodor et al. (US PAT 5,895,685; of record).

Bodor et al. disclose a packed dairy spread, which "includes two inhomogeneously combined components," where component (A) can be a fresh cheese, and "(B) can be a crème fraiche like component" (col. 1, ln. 57-59). The two components may be extruded through separate extrusion mouths into the same container, where components (A) and (B) are filled and packed in the same container, and "are present in alternating regions, resembling the shape of a grape-fruit or of a small cake divided into wedges" (col. 3, ln. 8-21). "It is preferred for component (A) and cream (B) to be different in colour such that it is perceivable with the naked eye" (col. 3, ln. 45-48). "Thus the product will have at least 2 regions in the pack with perceivably different colours" (col. 3, ln. 48-49). Further, starlike cross-section patterns or spiral or ying-yang patterns may be formed; see columns 8-9. "Making the nozzles and other filling equipment to create such patterns is well within the abilities of the skilled person." The components are filled in transparent plastic tubs or glass jar (col. 8). Cream (B) is preferably acidified, and souring of the cream can be done using a culture of lactic acid bacteria to obtain optimal flavor (col. 7, ln. 27-31). Thus, the claims are anticipated by the prior reference. Note that if cream (B) is soured, this constitutes a "fermented milk product" as it is fermented by the lactic acid bacteria.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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Claims 1-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bodor et al. (US PAT 5,895,685; of record), in view of Dupas et al. (US PAT 5,194,283; of record).

Bodor et al. is taken as cited above.

Dupas et al. provide a composite cheese product wherein two separate soft unripened cheeses are co-extruded in a concentric circle fashion, with a core component and a surrounding component. The curds of Dupas et al. may be aerated to lighten their texture, forming a type of "cheese mousse" (top col. 3), which contains a stabilizer in an amount of 1-2% by weight, such as that typically used in ice creams. For sweet versions of the curds, "it is possible to incorporate sugar, flavourings, colourants, pulps, jams or pieces of fruit", where "these additions are incorporated in the drained curds before extrusion and before or after aerating" (col. 3, ln. 20-27). The curds should possess a plastic consistency and be fermented by lactic acid bacteria without subsequent ripening (col. 2, lines 40-51). The inner curd employs a percentage weight dry matter of 15-50%; however, "the softness of the inner and outer curds may be increased by reducing the percentage by weight dry matter, for example, to approximately 17%, and in this case, the products are packed in containers on leaving the nozzle." "Where the product is packed in containers, the containers used may be opaque or advantageously transparent to show the contrasted layers of the inner and outer products during filling" (col. 3, ln. 30-33). The containers are disclosed as cups. Example 1 discloses the curd with an overrun to 100% (top col. 5).

Dupas et al. essentially teaches the same invention as taught by applicant (see applicant's specification, page 1), save for the fact that Dupas et al. provides a product wherein the soft unripened cheeses are co-extruded in a concentric circle fashion, with a core component and a surrounding component. Applicant's claims require a design by which the masses "are arranged side by side and the interface between the contrasting masses is a median surface within the volume of the pot" (claim 1). However, Bodor et al. also provide a similar product, where the components are present with a median surface as the interface between the components, instead of forming concentric circles. Bodor et al. also state that "making the nozzles and other filling equipment to create such patterns is well within the abilities of the skilled person." It is noted that the front page of the Bodor et al. patent cites the Dupas et al. patent. Thus, it would have been obvious for one of ordinary skill in the art to have produced the instantly-claimed invention; of two contrasting fermented milk products or one such fermented milk product and a flavoring composition, with a median surface as the interface between the components, i.e. as relative halves of a tub of cheese which can be discerned when looking into the top of the tub, or as spirals or other designs. The references each demonstrate the effectiveness of co-extrusion of the

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components and the use of either two fermented milk components (Dupas and Bodor), or of a fermented milk component and a non-fermented milk component (Bodor et al.). Bodor et al. demonstrate the effectiveness of coextrusion of two such components without forming concentric circle patterns. See also MPEP 2144.04 regarding the obviousness of aesthetic design changes and changes in shape, and MPEP 2144.06 regarding the substitution of known equivalent components (in this case, the unripened fermented cheeses of each reference, and the cream component of Bodor et al.) in a composition.


The product of instant claims 7-9 would have been obvious to have produced, in light of the specific teachings of Dupas et al. regarding the inclusion of lactic curds of plastic consistency, and fruits. The amounts of fruit and other flavorings would have been obvious to one of ordinary skill in the art to have determined, based upon desired tastes, etc. This would not have involved an inventive step and would not provide a patentable distinction over the combination of references as cited.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Keith Hendricks whose telephone number is (571) 272-1401. The examiner can normally be reached on M-F (8:30am-6pm); First Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (571) 272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).


KEITH HENDRICKS
PRIMARY EXAMINER